

83-77-I

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THE ATTORNEY GENERAL  
STATE HOUSE ANNEX  
25 CAPITOL STREET  
CONCORD, NEW HAMPSHIRE 03301-6397

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September 21, 1983

William T. Wallace, Jr., M.D., M.P.H.  
Executive Secretary  
Board of Registration in Medicine  
Hazen Drive  
Concord, New Hampshire 03301

Dear Dr. Wallace:

By memorandum dated May 31, 1983, and further discussion with the Board of Registration in Medicine at its September 8, 1983 meeting, the Board has requested an opinion concerning the propriety and enforceability of Med 404.04 of the Rules of the Board. This rule states that since the Board determines acupuncture to be the practice of medicine, it may only be practiced by licensed physicians. In our opinion, since the rule properly interprets the law in finding acupuncture to be the practice of medicine, the law prohibiting the practice of medicine without a license may be enforced against any person who practices acupuncture without a physician's license.

The rule in question states:

"It is the determination of the board that acupuncture/hypnosis (except in cases of theatrical performances) is the practice of medicine and shall remain as such until the American Medical Association and the Federal Drug Administration make a ruling otherwise. Such practice shall be confined to physicians licensed to practice medicine in the state of New Hampshire."

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The statute defining the practice of medicine, RSA 329:1, reads as follows:

"Any person shall be regarded as practicing medicine under the meaning of this chapter who shall diagnose, operate on, prescribe for or otherwise treat any human ailment, whether physical or mental."

The determination is therefore whether acupuncture falls within the meaning of "practicing medicine" as used in RSA 329:1 and thus whether a person who performs acupuncture without a physician's license is in violation of RSA 329:24, which makes the unlawful practice of medicine a misdemeanor.

Acupuncture has been succinctly defined as follows:

"acupuncture consists of the insertion of needles to various nerves below the skin, thus stimulating reactions to alleviate pain and other conditions of ill health." State v. Rich, 44 Ohio St.2d 195, 339 N.E.2d 630, 632 (1975).

A more detailed discussion of its characteristics can be found in Benedict, Pirro and Pisani, "Acupuncture: The Practice of Medicine?," 38 Albany Law Review 633 (1974).

The question of whether acupuncture qualifies as the practice of medicine has arisen in a number of other states. In most of those states, the courts, in the absence of any legislative declaration to the contrary, have determined that acupuncture is the practice of medicine and that any person who practices must have a physician's license. State v. Rich, supra; Thompson v. Texas St. Bd. of Med. Examiners, 570 S.W.2d 123 (Court of Civ. Appeals 1978); People v. Amber, 76 Misc.2d 267, 349 N.Y.S.2d 604 (1973). See also Doskow v. Nyquist, 58 A.D.2d 725, 396 N.Y.S.2d 295 (1977); State v. Won, 19 Or.App. 580, 528 P.2d 594 (1974); Acupuncture Society of Kansas v. Kansas State Board of Healing, 226 Kan. 639, 602 P.2d 1311 (1979); 72 A.L.R.3d 1257.

Although the issue has never been determined by a New Hampshire court, the statute in New Hampshire is comparable to that of the states where courts have found acupuncture to fall within the meaning of practicing medicine. RSA 329:1 quoted above includes terminology, especially the language "otherwise treat any human ailment," which is clearly broad enough to encompass a practice of inserting needles to alleviate pain and other ailments. As the New York court noted in People v. Cole,

219 N.Y. 98, 108, 113 N.E. 790, 703, as quoted in People v. Amber, 349 N.Y.S.2d at 608, the general language of a statute defining the practice of medicine

"bears evidence in itself that the words were chosen for the express purpose of prohibiting, except upon registration and authorization of the practitioner ... every means and method that could thereafter be used, or claimed to be used, to relieve or cure disease and infirmity ..."

The same can be said for RSA 329:1.

As pointed out in People v. Amber, 349 N.Y.S.2d at 613 and Thompson v. Texas State Brd. of Med. Examiners, 570 S.W.2d at 130, the legislature, not the courts, must make the determination of whether acupuncture should be licensed separately. When there is a statute which defines the practice of medicine broadly enough to include acupuncture, as is the case with RSA 329:1, in the absence of any legislation establishing a separate licensing scheme or an exception to the existing laws on the practice of medicine, we are left with no choice but to conclude that acupuncture does fall within the category of practices the legislature intended be regulated as part of the practice of medicine.

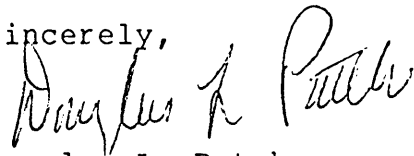
The New Hampshire legislature has, in fact, separately licensed various professions such as chiropractors, RSA 316, dentists, RSA 317-A, podiatrists, RSA 315, nurses, RSA 326-B, optometrists, RSA 326, physical therapists, RSA 328-A, and psychologists, RSA 330, which might otherwise fall within the definition of practicing medicine. See also 1 N.H.Op.A.G. 132, regarding limitation on practice of chiropractors.

Rule Med 404.04 as cited above appears to make the determination of whether acupuncture is the practice of medicine contingent on the rulings of the American Medical Association (AMA) and the Federal Drug Administration (FDA). This aspect of the rule we find to be improper in light of the clear and unequivocal intent of the legislature as evidenced by RSA 329:1. To allow the AMA and the FDA to dictate whether or not acupuncture should be considered the practice of medicine would in effect be giving them the power to usurp the power of the New Hampshire legislature. This part of the rule must therefore be modified since a change in the position of the AMA and FDA would have no legal effect on the law of New Hampshire unless the statutes were amended. We express no opinion as to whether the Board in the exercise of its rulemaking authority, RSA 329:9, could adopt a rule construing acupuncture to be excepted from the provisions of RSA 329. See RSA 329:21.

It should also be noted that this office received an inquiry regarding this opinion from an acupuncturist practicing in New Hampshire who requested that he be notified if we determined that he was unlawfully practicing medicine. In light of the fact that there may be several acupuncturists practicing in the State who are not licensed physicians, we would recommend that the Board notify them of the substance of this opinion to give them an opportunity to cease such practice before any enforcement measures are undertaken.

I trust this has been responsive to your question. Please let us know if you require anything further.

Sincerely,



Douglas L. Patch  
Assistant Attorney General  
Division of Legal Counsel

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